93-128
No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

J. MICHAEL STOLTZ, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF J.P. STOLTZ, DECEASED,

Petitioner,

vs.

FIRST PYRAMID LIFE INSURANCE COMPANY OF AMERICA, *et al.*,

Respondents.

Petition for Writ of Certiorari to the Arkansas Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Petitioner's due process rights, and in particular a litigant's right to a fair and impartial review, were violated when the author of an Opinion overturning a $10,000,000 jury verdict in favor of the Petitioner failed to disclose a substantial longstanding social relationship with an interested party that benefited from said decision, and who furthermore engaged in private in-state and out-of-state social functions and accepted gifts from said interested party while this matter was pending before him on appeal.

II. Whether the Petitioner's right to due process was violated by the Arkansas Supreme Court's failure to:

(a) Disclose the true extent and nature of its Chief Justice's long standing social relationship with the senior partner of an interested party;

(b) Alternatively, appoint an independent Special Master to investigate the nature and extent of said relationship, and disclose same to all interested parties;

(c) Stay the issuance of its mandate pending a formal inquiry into the nature of said relationship by the Arkansas Judicial Discipline and Disability Commission;

(d) Recuse and disqualify himself from deciding a Motion requesting a formal inquiry into said relationship, even after its Chief Justice publicly commented on the merits of same while said Motion was pending.

III. Whether the Petitioner's right to due process was violated by the failure of the State of Arkansas to require notice, as established by the United States Supreme Court in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988).

LIST OF ALL PARTIES TO THE PROCEEDINGS

The Plaintiff in the action from which this Petition arises was J. Michael Stoltz, nominated as the Special Administrator of the Estate of J.P. Stoltz, deceased, to pursue this cause of action on behalf of said Estate due to a conflict of interest between the pursuit of same by the appointed Executor, J. Stephen Stoltz, and his failure to pursue said claim on behalf of the Estate. The Defendant in said proceedings Was First Pyramid Life Insurance Company of America. Since no party to the action below was a corporation, there are no parent or subsidiary corporations to disclose.

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OPINIONS BELOW

On December 21, 1992, the Arkansas Supreme Court entered an *Opinion* which reversed and dismissed a jury verdict totalling approximately $10,000,000 to the Estate of James Patrick Stoltz, deceased, claiming same was barred by limitations. (Appendix at 1a-9a). After said Opinion was rendered, the Petitioner ascertained that a substantial social relationship existed between the author of the aforementioned Opinion, and the senior partner of an interested party in the trial court proceedings, and that private trips and excursions between these two individuals had transpired while this matter was pending on appeal before the Arkansas Supreme Court. On January 19, 1993, the Petitioner filed a *Motion For Vacatur, To Disqualify And, In The Alternative, To Appoint A Special Master.* Said Motion was denied by *Order* dated February 5, 1993. (Appendix at 10a). The Petitioner filed a *Petition For Rehearing* before the Arkansas Supreme Court, and same was denied by *Order* dated February 22, 1993. (Appendix at 27a-28a). The Petitioner had filed a *Motion For Stay*, requesting that the Arkansas Supreme Court not render a decision on the *Petition For Rehearing* until after the Arkansas Judicial Discipline and Disability Commission had investigated a Complaint filed by the Petitioner against the Chief Justice for the aforementioned social relationship, and his failure to recuse or disclose same. (Appendix at 12a-26a). Said Motion was denied by *Order* dated February 22, 1993. (Appendix at 27a-28a). The Petitioner filed a *Motion For Stay Of Mandate* on February 22, 1993, pending a prosecution of these proceedings to the Supreme Court of the United States. (Appendix at 29a-31a). Said Motion was denied on March 15, 1993. (Appendix at 40a). Finally, the Petitioner filed a *Motion To Supplement The Record* on March 12, 1993, seeking to document the fact that the record in the lower court proceedings was not reviewed by the Arkansas Supreme Court subsequent to the court's Opinion on December 21, 1992. Said Motion was denied by *Order* dated April 5, 1993. (Appendix at 32a-39a). The Mandate was entered on March 15, 1993. (Appendix at 40a).

STATEMENT OF JURISDICTION

The Opinion of the Arkansas Supreme Court was rendered on December 21, 1992; that court denied the *Petition for Rehearing* on February 22, 1993. This Court granted the Petitioner's *Application For Extension Of Time In Which To File A Petition For Writ Of Certiorari* by *Order* dated May 20, 1993. (Appendix at 46a). Since the time during which it might be filed expires on July 22, 1993, this Petition is timely, and this Court has discretionary jurisdiction to consider this case pursuant to 28 U.S.C. §§ 1257(2) and (3).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

This case implicates the due process clause of the Fourteenth Amendment to the Constitution of the United States, which provides:

> **Citizenship — Due process of law — Equal protection.**
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property , without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

This case also involves the construction of pertinent canons from the Arkansas Code of Judicial Conduct. Said canons read, in pertinent part, verbatim, as follows:

Canon 1:

> An independent and honorable judiciary is indispensable to justice in our society.

Canon 2:

> A Judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A Judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment.
>
> Commentary: Public confidence in the judiciary is eroded by irresponsible or improper conduct by Judges. A Judge must avoid all impropriety and appearances of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

Canon 3C:

> DISQUALIFICATION: 1. A Judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where he has a personal bias . . . .

> (d) REMITTAL OF DISQUALIFICATION: A judge disqualified by the terms of Canon 3C(1)(c) or 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the Judge's participation, all agree in writing that the Judge's relationship is immaterial or that his financial interest is insubstantial, the Judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

Canon 5:

> A Judge may . . . engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.

STATEMENT OF THE CASE

Petitioner is mindful of Rule 14(g) of the Rules of this Honorable Court, and will make his Statement of the Case as concise as possible. The basis for this Petition is basically simple: A Supreme Court Justice should not socialize with an interested party while a case is before him on appeal, without at least divulging same on the record so all parties can respond accordingly. However, there is a convoluted factual pattern that must be set out in some detail for this Court to be able to appreciate why it should agree to hear this case.

First Pyramid Life Insurance Company of America (hereinafter referred to as First Pyramid or FPL) wrote two policies of life insurance totalling $2 million on the life of J.P. Stoltz, deceased. The contractually designated beneficiary was found by a jury to be his Estate. There was conflicting evidence regarding whether the deceased insured wanted his eldest son, J. Stephen Stoltz, or his Estate, to be the beneficiary, but as a matter of contract, on paper, in black and white, the Estate was the designated beneficiary.

J.P. Stoltz died in December, 1977. The Friday, Eldredge & Clark Law Firm (a/k/a the Friday Law Firm or the Friday Firm) was appointed the attorneys for the Estate shortly thereafter. First Pyramid realized it had a problem when the insured died due to the manner in which it had handled its paper work. The confusion concerned the entity it should pay as the proper beneficiary. It called in its attorneys (not the Friday Firm at that time) for advice on what it should do. Both of its in-house attorneys recognized the beneficiary discrepancy, and advised it through written memos that interpleading the money was the safest course of action to take, but that said action would "alert" the losing party to its potential claim, and could subject, or expose, the insurance company to a lawsuit from the loser. This "discrepancy in the proper beneficiary" was not, at any time, passed on to the Estate by the insurance company.

On the same date it received these memos from its attorneys, the insurance company allegedly had a meeting, wherein the alternative of interpleading the money, and its concurrent exposure to a lawsuit by the loser, was discussed. First Pyramid decided to pay the son, *because he was the only one who had made a claim for the proceeds, and was the only one who thought he had a claim to the proceeds.* The Estate was never told it had a potential claim to the proceeds. The insurance company decided that, if it was subject to being sued by the loser if it alerted all parties to their potential

claim, it would be better off paying the son, who knew he had a claim, and had made a claim, and take its chances that the other entity with a claim to the proceeds, *i.e.*, the Estate, would never find out about same.

When the members of the Estate found out the Estate was the rightful beneficiary, yet had not received the proceeds, a lawsuit was instituted. On August 10, 1991 a Pulaski County, Arkansas jury returned a multi-million dollar verdict in favor of the Petitioner, who had been appointed Special Administrator of his father's Estate in order to pursue this cause of action. First Pyramid filed a Notice of Appeal on September 10, 1991.

The Arkansas Supreme Court overturned a jury's finding of fact, *i.e.*, that fraud sufficient to toll the limitations period was present, same being presented to the jury without objection and by virtue of an instruction co-authored by the parties' respective counsel, in an Opinion rendered on December 21, 1992, and reversed and dismissed this lawsuit. Approximately one week after that decision came down, the Petitioner was apprised that a substantial and unique social relationship, of long standing duration, existed between the Chief Justice of the Arkansas Supreme Court, who authored the Opinion, and members of the Friday, Eldredge & Clark Law Firm (the largest law firm in the State of Arkansas), including, but not limited to, Herschel Friday, that firm's senior partner. The Petitioner also became apprised that said social relationship included, but was not limited to, quail hunting through the years on Mr. Friday's private farm located near Mayflower, Arkansas, and on leases located in the State of Texas secured by him and Chief Justice Holt.

While the Friday Firm was not an actual party to the aforementioned litigation, a review of the record unequivocally indicates it was an interested party, and had a vested interest in the jury verdict of the lower court being overturned.

The Friday Law Firm represented J.P. Stoltz while alive, Steve Stoltz as Executor of the Estate, Steve Stoltz individually, the Estate itself, First National Bank of Little Rock, (hereinafter referred to as First National Bank) as the largest creditor of the Estate, First National Bank as the Trustee to which the insurance company proceeds would have flowed had the Estate been paid, the Defendant insurance company itself, Polyvend Corporation (a multi-million dollar family-owned corporation and the largest asset of the Estate), and the insurance agency which sold the policy to the deceased, at all pertinent times. Herbert Thomas, who owned the insurance company, was a large stockholder of the Bank. William H. "Buddy" Sutton, one of the senior partners of the Friday Law Firm, was on the Board of Directors of the insurance company. Herschel Friday, the senior partner of the Friday Law Firm, was on the Board of First National Bank. Within six (6) days after Steve Stoltz was paid these proceeds, he bought $3,000,000 worth of insurance from First Pyramid, and arranged the purchase of large First Pyramid Life policies for two of the employees of Polyvend, the corporation he took over from his father.

The IRS included the $2 million worth of insurance proceeds in the deceased's Estate, forcing the Estate to pay the tax on money it did not receive. The Friday Law Firm sued the IRS for a refund on behalf of the Estate. During the IRS litigation, the Friday Firm tendered to the IRS certain First Pyramid Life files regarding these policies, but only after whiting out certain portions. The IRS ultimately settled the case for almost what it claimed in the first place, and chastised the Friday Firm, for whiting out certain portions of these files. The IRS furthermore told the Friday Firm it had not proven that the Estate was not in fact the prior beneficiary of these policies. The Friday Firm was legal counsel for the insurance company also at this time, and had members on its board. Accordingly, the aforementioned actions were done to protect First Pyramid as much as to benefit the Estate.

The Friday Firm reviewed First Pyramid's files pertinent to these policies in November of 1979. There is conflicting evidence regarding whether or not Steve Stoltz was ever told of the Estate's potential claim to these proceeds. A letter from the Friday Firm dated June 7, 1983 to him, indicated the Estate had a potential claim, but also had language to the effect that they had not reviewed the entire insurance company file. Additionally, this letter appears to be advising him "individually," regarding the proper use of the money he had received "individually." Two members of the Friday Firm both testified at trial that no other member of the Estate was ever told by First Pyramid Life it had a potential claim to these proceeds. Steve Stoltz testified at trial that everything he did was upon the advice of the Friday Firm, and that had he been told the Estate had a claim to these proceeds he had received, he would have notified the beneficiaries of the Estate to their potential claim and otherwise responded accordingly.

No distributions of any kind have been made in this Estate, and said Estate has been the subject of numerous lawsuits filed in numerous forums. The First National Bank of Little Rock, the named Trustee for certain minor beneficiaries of the Estate, testified through trust officers that it would have pursued this matter on behalf of the Estate had it been told the Estate had any potential claim to these proceeds. First Pyramid Life's in-house counsel (not the Friday Firm at that time) advised it in January of 1978 of said Trustee's probable actions if the Bank were apprised of the Estate's claim. Still, the Estate was not apprised at any time of the claim through proper channels.

The conflicts between the son receiving this money individually, and serving as Executor of the Estate, were noted by the Friday Firm in its files, yet the Friday Firm took no actions to apprise the Estate, or the Trustee, of the Estate's claim. The son was required to sign an Indemnity Agreement when he received these proceeds. The only time First Pyramid Life had an individual sign

an Indemnity Agreement was when it was afraid someone else had a claim to the policy proceeds, and wanted to reduce its exposure.

Sometime around September of 1987, several members of the Estate began to question the way the Estate was being managed by the Friday Law Firm and Steve, whom said firm was "advising" individually. They secured the services of new attorneys to assist them in investigating the management of the Estate, and were apprised, for the first time, on August 8, 1988, that the Estate had a potential claim to these proceeds, or that Steve Stoltz had been paid instead of the Estate. Approximately one month later, the Friday Firm was removed as the attorneys for the Estate.

The lawsuit in question was filed by the Estate on April 20, 1989 against First Pyramid Life. The insurance company raised limitations as a defense, and claimed that the Friday Law Firm, as attorneys for the Estate, had knowledge of the Estate's potential claim, and that said knowledge was imputed to the client, or the Estate. The Estate rebutted this argument by arguing that the Friday Law Firm had irreconcilable conflicts of interest which prevented the imputation of knowledge to the Estate, and at trial there was no evidence that the Estate itself had actual knowledge that it had not been paid the insurance proceeds in question. The Friday Law firm was approached by the Petitioner, and would have been made a party to this litigation but for the fact that it executed a Tolling Agreement which tolled the statute of limitations while litigation against the insurance company was pursued.

Immediately upon learning that the Chief Justice of the Arkansas Supreme Court had a long standing and close friendship with the Friday Law Firm, the Petitioner instructed his attorneys to investigate same. During said investigation, the Petitioner learned that said friendship was of long standing duration, and that the Chief Justice had hunted with Mr. Friday, or on Mr. Friday's land at his invitation, through the years, including two occasions while

this matter was pending on appeal; once on Mr. Friday's private farm in Arkansas, and once on private leases in the State of Texas.

The Petitioner filed a Motion requesting that the Opinion be vacated, that the nature of the relationship be fully disclosed, that, alternatively, an independent Special Master be appointed to ascertain the nature of same, and that the entire court recuse and have the Governor appoint seven (7) Special Justices to hear the case in accordance with prior Arkansas precedent. The Petitioner also sought to stay further movement in these proceedings on the merits until after the aforementioned "sought after" facts were disclosed. All such Motions were denied.

The Petitioner vigorously argued that his constitutional due process right to a fair and impartial hearing would be violated absent a disqualification of the Arkansas Supreme Court, and that the Estate's property was being taken without due process of law, as mandated by the notice requirements of the United States Constitution, and as interpreted by decisions from the United States Supreme Court. It is out of this factual scenario that the Petitioner turns to this Court for relief.

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONER'S DUE PROCESS RIGHTS, AND IN PARTICULAR A LITIGANT'S RIGHT TO A FAIR AND IMPARTIAL REVIEW, WERE VIOLATED WHEN THE AUTHOR OF AN OPINION OVERTURNING A $10,000,000 JURY VERDICT IN FAVOR OF THE PETITIONER FAILED TO DISCLOSE A SUBSTANTIAL, LONG STANDING SOCIAL RELATIONSHIP WITH AN INTERESTED PARTY THAT BENEFITED FROM SAID DECISION, AND WHO FURTHERMORE ENGAGED IN PRIVATE IN-STATE AND OUT-OF-STATE SOCIAL FUNCTIONS AND ACCEPTED GIFTS FROM SAID INTERESTED PARTY WHILE THIS MATTER WAS PENDING BEFORE HIM ON APPEAL.

Rule 27 of the Rules of the Arkansas Supreme Court provides the method to be followed "whenever it is desired to suggest disqualification of a Judge of this case in the case to be submitted . . ." Rule 23 of the Rules of the Arkansas Supreme Court provides for the procedure to be followed "in cases where no provision is made by statute, or if not covered by other rules, . . ." and states in those instances that this court shall follow a procedure in accordance "with the practice heretofore existing."

In this instance, the substantial and long standing social relationship between Chief Justice Jack Holt, Jr. and the Friday Law Firm was not brought to light until after the Supreme Court had rendered its original decision on the merits in these proceedings. The case of *Johnson v. Sturdivant,* 295 Ark. 622, 758 S.W. 2d 415 (1988), involve a similar situation, wherein Justice Purtle wrote an Opinion for a 6-1 majority when he had a personal claim pending against Farmers Insurance Company, the insurer of one of the tangential Defendants in a lawsuit involving multiple

Defendants. The Appellant in that case, Georgia Pacific, asked not only that Justice Purtle recuse, but that the remaining Justices consider disqualifying in view of the decision of the Supreme Court in the *United States and Aetna Life Insurance Company v. Lavoe,* 475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986), and the more recent decision in *Lilejeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988). In *Sturdivant,* at 416, Justice Hickman wrote:

> We would not presume Justice Purtle intentionally erred or knew Farmers Insurance was involved in this lawsuit, *but it was his duty as the Judge assigned to write the Opinion to know it. His personal legal business should never conflict with his role as a justice, and it is his duty, not ours or others, to see to that.* (emphasis added).

In *Sturdivant,* Justice Purtle makes the point that there was no suggestion of disqualification made before the case was submitted. However, it was obvious the facts supporting a suggestion of disqualification were not discovered until after the decision was rendered. Accordingly, Rule 23 provided the "practice heretofore existing." Also, Justice Purtle indicates:

> I had no knowledge that Farmers Insurance Group had any interest in this case until I was informed of the Motion and Petition by a newspaper reporter who had received copies of these documents before I did.

He also indicates that he did "absolutely nothing improper or unethical." The Arkansas Supreme Court reasoned in *Sturdivant,* and in accordance with its Rules and the Arkansas Code of Judicial Conduct, that that was not the issue. The *appearance* of an

impropriety, or a situation where the impartiality of a Judge could *reasonably be questioned* is the test.

Chief Justice Holt may not have known of the depth of the Friday Firm's involvement until he got involved in these proceedings. However, a reading of the record makes it absolutely, unequivocally clear that the Friday firm has a stake in this lawsuit. Furthermore, Justice Corbin pointedly asked from the bench during oral arguments, "Why haven't you sued the Friday Firm?" The Friday Firm's involvement is apparent to any reader of the record. Conversely, there is compelling evidence that the Chief Justice neglected to ever read the record in these proceedings.

The Arkansas Code of Judicial Conduct deals specifically with the need for a judge to avoid the *appearance* of bias or partiality.

Canon 1 begins:

> An independent and honorable judiciary is indispensable to justice in our society.

Canon 2 reads in part:

> A Judge . . . should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A Judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment.
>
> Commentary: Public confidence in the judiciary is eroded by irresponsible or improper conduct by Judges. A Judge must

> avoid all impropriety and appearances of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

Canon 3C reads as follows:

> DISQUALIFICATION: 1. A Judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where he has a personal bias . . . (d) REMITTAL OF DISQUALIFICATION: A Judge disqualified by the terms of Canon 3C(1)(c) or 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the Judge's participation, all agree in writing that the Judge's relationship is immaterial or that his financial interest is insubstantial, the Judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

Chief Justice Holt did not disclose any social relationship between himself and the Friday Law Firm. If he had, he would have been respectfully asked, in accordance with these rules, to recuse.

Canon 5 states:

> A Judge may . . . engage in the arts, sports, and

> other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.

This same Canon states that a judge should not accept gifts, and that if he does accept gifts over $100, he must disclose same. Petitioner finds it hard to believe that hunting private, pen raised quail through the years, including but not limited to while this matter was pending on appeal, on a private ranch complete with a hunting lodge said to be elaborate and elegant, over an extended hunting season much longer than that allowed by the Arkansas Game and Fish Commission to the ordinary citizen, coupled with trips to the State of Texas to hunt on privately leased lands, do not rise to the level of gifts.

The Arkansas Supreme Court has interpreted its own rules in *City of Jacksonville v. Venhaus,* 302 Ark. 204, 788 S.W. 2d 478 (1990) and *Patterson v. R.T.,* 301 Ark. 400, 784 S.W. 2d 777 (1990), and quotes many of the aforementioned Canons and Rules. It is unequivocally the law that:

> The proper administration of the law requires not only that Judges refrain from actual bias, *but also that they avoid all appearances of unfairness.* (emphasis added).

See Venhaus at 480, citing *Bolden v. State,* 262 Ark. 718, 561 S.W. 2d 281 (1978). The rules applicable to the Justices of the Federal bench are virtually identical. *See* 28 U.S.C. § 455. The standard is an objective one. *United States v. Conforte,* 624 F.2d 869, *cert. denied*, 449 U.S. 1012.

The Respondent will argue that the Friday Firm was not an interested party, and did not stand to gain from a reversal of the

Opinion against the insurance company. In the first place, whether or not an entity is an interested party is not governed by whether said party gained or lost ground by the decision after the fact. In the second place, the Friday Firm, which is currently being sued by the Estate, was subject to being sued for a pattern of mismanagement regardless of the outcome of the insurance litigation.

Additionally, if the Arkansas Supreme Court's Opinion stating that "notice" to Rita Fields and Jack Smith, two elderly heirs, somehow binds the "Estate" holds up, the Friday Firm will surely raise this argument in the suit currently pending against them. (Note: Such a holding is totally improper, and repugnant to established law, but is not argued substantively at this time in this Petition. (*See Whelan v. Edwards*, 31 Ark. 723 (1877), Arkansas Code Annotated § 28-1-112; *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988), citing *Mellane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) and *Menonite Board of Missouri v. Adams*, 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 180 (1983); *Page on Wills*, §§ 2739, 2642; *Sowell v. Housman*, 207 Ark. 929, 183 S.W. 2d 511 (1944)).

Also, it was the insurance company itself that first argued that the Friday Firm was guilty of improprieties when it moved for Summary Judgment (based on limitations) because the Friday Firm had reviewed the insurance company's files and should have picked up on the Estate's claim. Partners of the Friday Firm testified that their review of the insurance company's files led them to believe Steve Stoltz was the proper beneficiary, although the Friday Firm also represented First Pyramid at this time, had firm partners on its board, and surely did not want to subject its two *other* clients to a lawsuit. The jury's verdict proves the Friday Firm was guilty of mismanagement and erroneous advice at the very least, and helps establish a pattern of same on the part of that firm.

Furthermore, under Arkansas Code Annotated § 16-61-201, *et*

seq., the right to contribution among tortfeasors does not accrue, or arise, until after one tortfeasor has paid more than his or her fair share of the damages sustained by the injured party. A Third Party Complaint seeking contribution from a joint tortfeasor can be filed, notwithstanding the fact that the original limitations period applicable to the Plaintiff's cause of action has already run. *Schott v. Colonial Baking Co.*, 11 F. Supp. 13 (W.D. Ark. 1953). In other words, as the statute is currently written, it is conceivable that First Pyramid Life could bring a cause of action against Friday, Eldredge and Clark for contribution, as a joint tortfeasor whose actions contributed to the loss the Plaintiff sustained, if this verdict is rightfully reinstated and the Petitioner collects on same.

It must also be remembered that First Pyramid sued Steve Stoltz as a Third Party Defendant in the trial court on the Indemnity Agreement he signed. That cause of action was severed, but is viable in the event the Petitioner collects anything from the insurance company. Under those circumstances, Steve Stoltz could bring Friday, Eldredge and Clark into the lawsuit as a third party Defendant in those proceedings because he has testified that everything he did, including what he did with the insurance money in question, was upon the advice of the Friday Law Firm. Letters were introduced into evidence from the Friday Firm to corroborate this testimony.

As ironic as it may be, if First Pyramid or Steve Stoltz brings either of the aforementioned causes of action against the Friday Firm, that firm will have no limitations defense to same because said cause of action will have just recently accrued.

Last but not least, there are intangibles involved over and above the aforementioned tangible realities. Numerous issues involving *res judicata* and collateral estoppel come into focus, and could affect the Friday Firm, one way or the other, in any litigation the Estate pursues against it. Furthermore, no law firm would want

to suffer through the revelation that it chose to do nothing when it came across information that one client it was representing (the Estate) should have been paid money that was improperly paid to another client it was representing (Steve Stoltz) by another client it was representing (First Pyramid). The Friday Firm took the hard road. It did nothing to solve the problem, yet continued to represent each of the aforementioned clients and collect legal fees for same. These insurance proceeds were supposed to have been paid to the Estate, for the benefit of numerous entities, including minor children. Instead, the money went to Steve Stoltz, along with a multi-million dollar company (Polyvend of Conway), a $1.62 million debt owed First National Bank (also represented by the Friday Firm) was retired, and these other children received absolutely nothing from their late father's Estate. The Friday Firm simply created a horrendous mess, and at the heart of same lies this insurance controversy, created by its client (First Pyramid) and not prevented by it.

II.

THE PETITIONER'S RIGHT TO DUE PROCESS WAS VIOLATED BY THE ARKANSAS SUPREME COURT'S FAILURE TO:

(a) Disclose the true extent and nature of its Chief Justice's long standing social relationship with the senior partner of an interested party;

(b) Alternatively, appoint an independent Special Master to investigate the nature and extent of said relationship, and disclose same to all interested parties;

(c) Stay the issuance of its mandate pending a formal inquiry into the nature of said relationship by the Arkansas Judicial Discipline and Disability Commission.

The factual and legal basis for the Petitioner's request that this Court review this matter has been adequately set out in the preceding sections of this pleading. The Petitioner wishes to draw special attention to the fact that he was very constrained and conservative in his allegations of wrongdoing, and potential ethical violations, by the Chief Justice in his pleadings before the Arkansas Supreme Court. Neither he, nor his attorney, is on a vendetta against the Arkansas Supreme Court, where said attorney will have to practice for years to come. He does feel like the Chief Justice should have recused, and feels he is obligated to divulge the full nature and extent of his relationship with the Friday Law Firm so that all parties will know the hand of cards they have been dealt. If the Chief Justice is, as he claims, guilty of no wrongdoing, then so be it. Petitioner is simply after the truth. This Honorable Supreme Court cannot possibly grant every Petition for Writ of Certiorari brought before it. Time constraints, and the volume of Petitions filed, simply prohibit same. One is left to wonder where

the Petitioner stands if the investigation by the Arkansas Judicial Discipline and Disability Commission (which he was forced to turn to, as a last resort, when the Arkansas Supreme Court would not, voluntarily disclose the information sought) reveals significant ethical violations by the Chief Justice, yet the Mandate has been issued in these proceedings and same are deemed closed.

The Petitioner respectfully requested that the Arkansas Supreme Court stay the issuance of its Mandate pending said formal inquiry, yet his Motion for same was denied. The Arkansas Supreme Court, and its Chief Justice, should welcome the opportunity to clear itself. Instead, their actions raised questions about the allegations of sporting events, horse racing, etc. which the Petitioner failed to mention in his pleadings because he had no witnesses who were willing to publicly stand behind their statements to him concerning same, and he was not willing to place speculation and rumors in a pleading, especially when he respected his Chief Justice enough to voluntarily come forward with a full disclosure.

(d) The Petitioner's right to due process was violated by the Arkansas Supreme Court's failure to recuse and disqualify itself from deciding a Motion requesting a formal inquiry into said relationship, even after its Chief Justice publicly commented on the merits of same while said Motion was pending.

This case has received widespread, statewide publicity within the State of Arkansas. Seveal well circulated and read newspaper/ magazines have printed articles, some extensive, on the proceedings. The television news networks have followed the arguments presented before the Arkansas Supreme Court with interest. After the Oral Argument on the Petitioner's *Motion For Vacatur, To Disqualify And, In The Alternative, To Appoint A Special Master, And Motion For Extension Of Time To File Petition*

For Rehearing, the undersigned attorney and the Chief Justice were interviewed by several TV stations in the Little Rock area. The Motion had not been conferenced by the full court, and no decision at that time had been made. The Chief Justice of the Arkansas Supreme Court took the opportunity to lambaste the Motion filed by the Petitioner. He berated same as baseless, unmeritorious, etc. The Petitioner has a tape of same, and can provide it to this Court if necessary. The Chief Justice's comments are an independent basis for the Petitioner's amended ethical complaint against him pending before the Arkansas Judicial Discipline and Disability Commission, *i.e.*, commenting publicly on a Motion under submission.

Finally, the Chief Justice has disqualified himself from any further participation in these proceedings due to the ethical complaints lodged against him. If said ethical complaints are found to be meritorious by the Arkansas Judicial Discipline and Disability Commission, it seems to the Petitioner same would be very supportive of his position that the Chief Justice should have recused at the inception of these proceedings. The question is, where does that leave the Petitioner, legally, at that point in time?

(e) The Petitioner's right to due process was violated by the Arkansas Supreme Court's (1) failure to read the lower court record, or (2) alternatively, failure to accurately read same.

The Arkansas Supreme Court overturned a jury's finding of fact on the supposed basis that the lower court record contained no evidence of fraud perpetrated by First Pyramid, and, therefore, the Petitioner's claim was barred by limitations. It is apparent to Petitioner that the Arkansas Supreme Court either never read the lower court record, or, alternatively, failed to read same accurately.

When representatives of the insurance company met in order

to determine who was the proper beneficiary, they received two memos from their in-house counsel advising them to interplead this money, yet advising them that same would alert the "potential" beneficiary that did not receive the money to its claim, and could subject the insurance company to a lawsuit. The Arkansas Supreme Court's Opinion indicates that a subsequent "meeting," wherein these two memos were presented, occurred approximately one week afer the original meeting at First Pyramid wherein the beneficiary discrepancy was discussed. (Appendix at 3a). Fraud can be inferred, just as any other fact, circumstantially. It is much more probative that the insurance company received memos from its in-house counsel advising it to interplead the money, yet on the *same day* it decided to pay Steve Stoltz, than to believe that the insurance company made this decision one week after the original meeting wherein the beneficiary discrepancy was discussed. The Arkansas Supreme Court's Opinion reads as though the insurance company made a measured decision after a week of reflection, when such is not the case.

Furthermore, the Petitioner's counsel received an extension of time from the Arkansas Supreme Court to file a Supplemental Abstract of the record with his *Motion For Vacatur, et al.*, in order to concisely indicate to the Supreme Court where fraud existed in the lower court's record. The record in these proceedings was over five thousand (5,000) pages. Such was an arduous task. (*See* 47a-60a). The Petitioner subsequently learned that the Arkansas Supreme Court never checked out the record to discern whether or not the dissertation of testimony contained in his Supplemental Abstract was true. Same is accurate, and he has the record to back it up. It is unfathomable to Petitioner that the Arkansas Supreme Court can overturn a jury's finding of fact, presented to the jury on an instruction co-authored by the parties' respective counsel, without objection (Appendix at 61a), without either being in the courtroom to discern the witnesses' demeanor on the stand, and the substance of their testimony, or, without doing the next best thing, *i.e.*, reading the record.

III.

THE PETITIONER'S RIGHT TO DUE PROCESS WAS VIOLATED BY THE FAILURE OF THE STATE OF ARKANSAS TO REQUIRE NOTICE, BEFORE THE TAKING OF PROPERTY AS ESTABLISHED BY THE UNITED STATES SUPREME COURT IN *TULSA PROFESSIONAL COLLECTION SERVICES, INC. V. POPE,* 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988).

The Arkansas Supreme Court's Opinion mistakenly states that even if fraud is present, same is somehow cured because two (2) elderly individuals, one an heir of the Estate, and one a possible heir, who may have gotten 1/11th of the income off of the interest from these proceeds during their limited lifetime, had knowledge the Estate was the beneficiary of these life insurance policies, and saw financial statements indicating same, prior to the insured's death. Such a holding violates the due process notice provisions mandated by Amendment Fourteen to the United States Constitution, and the application of same to the probation of Estates, as outlined by *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478, 101 S. Ct. 1340, 99 L. Ed. 2d 565 (1988).

In the first place, it has been the rule of law in Arkansas *for more than a century* that any claim on behalf of the Estate must be brought by the Executor or Administrator of the Estate. *Whelan v. Edwards,* 31 Ark. 723 (1877). First Pyramid itself moved for Summary Judgment because the heirs of the Estate were attempting to bring a cause of action to recover these insurance proceeds instead of the Executor. J. Michael Stoltz had to be appointed Special Executor to proceed forward in this lawsuit.

The Estate is an entity in and of itself. Only the Executor, or one appointed Special Executor, can receive "Notice" that can bind

the Estate. Arkansas Code Annotated § 28-1-112. This Court has held that any creditor of the Estate must be give specific and actual notice if their identity is "reasonably ascertainable," and that to take one's property without providing same violates the due process clause of the Fourteenth Amendment to the United States Constitution. *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988); citing *Mellane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) and *Menonite Board of Missouri v. Adams,* 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983).

Taking this one step further, and assuming for purposes of argument that the aunt and uncle had notice, which is debatable, and that the Uncle by marriage even had a *claim,* which is *unlikely,* no one, not the Arkansas Supreme Court's law clerks nor opposing counsel, could find a case that holds that notice to an elderly aunt and uncle under these circumstances will bind the other children, especially minor children, that make up the Estate. The aunt and uncle testified in rebuttal only to counter First Pyramid's contention that the deceased's intention was to designate the son as beneficiary and alleged comments by him verifying same prior to death. This evidence was not even presented, as the Opinion would read, in the Defendant's case in chief. Perhaps the aunt and uncle cannot receive their share of the income, but that issue should be determined in Probate Court after a thorough trial.

This Arkansas Supreme Court has mistakenly cited an untenable basis for erasing a potential $10 million judgment, without citing any case law, precedent, statutory authority, etc. The leading treatise on Estates, *Page on Wills,* §§ 2639, 2642, cites Arkansas cases and states the following when dealing with probate law and an Estate:

> Notice must be served upon the persons who are specified in the statute which regulate

> notice. The contents of the citation or notice must conform to the requirements of the statute. Without express authority, the entrance of appearance by one heir does not enter an appearance for another heir.

Id. at 87, 88, and 92.

The Arkansas case of *Sowell v. Housman,* 207 Ark. 929, 183 S.W. 2d 511 (1944) is cited as being in conformance with the aforementioned, hornbook rules of law. *See also, Matter of Lacy's Estate,* 126 Cal. Reptr. 432, 54 Cal. App. 3rd 172 (1975) and *Heathagen v. Harby,* 78 Wash. 2d 934, 481 P.2d 438 (1971). These cases are not exactly on point, but the analogy is clear. The Estate is an entity that can only be bound by notice, in the statutorily described manner, to the Executor or Administrator.

Furthermore, First Pyramid offered no proof on the age of these minor children at all pertinent times, much less whether they were incapacitated or incompetent for some other reason. It had the burden of proof on the issue of limitations; said burden does not shift to the Plaintiff because it is obvious from the record we are dealing with minor children. Notice to a minor, by statute, must go through a guardian. *See* Arkansas Code Annotated § 28-65-101, *et seq.*

Finally, Lewis Mathis, an attorney for the Friday Firm, berated and ridiculed the balance sheets in question in his testimony as bogus, and said that *everyone* knew the deceased put what he thought his bankers wanted to see on said documents.

In sum and substance, notice to these two individuals, assuming *arguendo* same existed, would not bind the Estate. Furthermore, whether or not Rita Fields and Jack Smith used due diligence is a question of fact, judicially recognized as such, for the

jury. This issue was presented to the jury without objection. The Arkansas Supreme Court's fall back position is simply untenable.

The Arkansas Supreme Court's Opinion is directly contrary to long established rules of law pertaining to insurance companies and their obligations to those they deal with. It also constitutes state sanctioning of a deprivation of property by the insurance company without proper and constitutionally mandated notice. If a creditor is entitled to adequate notice when their identity and address can be reasonably ascertained, then certainly the known heirs of an Estate, or their Guardians/Trustees, have to receive notice before their property can be taken from them by silence on the part of one with a duty to pay. The Arkansas Supreme Court's "blessing" of this conduct amounts to state action, and violates the Estate's due process rights, and those of the beneficiaries encompassing same. These arguments were raised and vigorously argued by the Petitioner before the Arkansas Supreme Court, and were properly preserved for presentation to this Court.

CONCLUSION

For the foregoing reasons, the Petitioner prays that his Petition for Certiorari be granted.

Respectfully submitted,

CHARLES DARWIN DAVIDSON
Of Counsel
CHARLES PHILLIP BOYD, JR.
DAVIDSON LAW FIRM, LTD.
Attorneys for Petitioner
P.O. Box 1300
Little Rock, Arkansas 72203
(501) 374-9977

OPINION OF THE SUPREME COURT OF ARKANSAS DATED DECEMBER 21, 1992

SUPREME COURT OF ARKANSAS

No. 92-4

Opinion Delivered DEC 21 1992

FIRST PYRAMID LIFE INSURANCE COMPANY OF AMERICA,

APPELLANT,

V.

J. MICHAEL STOLTZ, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF J.P. STOLTZ, DECEASED,

APPELLEE,

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT,
NO. 89-2464
HON. CHRIS PIAZZA, JUDGE,

REVERSED ON APPEAL; AFFIRMED ON CROSS APPEAL.

JACK HOLT, JR., Chief Justice

The focus in this appeal is whether fraudulent concealment was proven by the Estate of J.P. Stoltz ("Estate") in order to toll the statute of limitations on its claim against the appellant, First Pyramid Life Insurance. We hold that the limitations period was not tolled. Thus, we reverse the finding of the trial court.

The facts leading up to this controversy are as follows. In

1975, J.P. Stoltz applied for life insurance with the appellant, First Pyramid Life Insurance ("First Pyramid"). Since Mr. Stoltz had health problems, he was heavily rated for insurance. First Pyramid felt he was a good candidate for a policy called a Flex 79 Trust. The advantage of this kind of policy is that it allows employers to provide employees with life insurance while making the premiums tax deductible. Through this, Stoltz could have his company, Polyvend, Inc., provide him with life insurance virtually tax free. In order to receive these tax benefits, however, the *owner* of the policy had to be someone other than the insured. Another problem was that at the time of Mr. Stoltz's application, Arkansas had a $50,000 statutory ceiling on the maximum life insurance that could be purchased by an employer for an employee.

To overcome this ceiling, First Pyramid arranged for the Trust to be based in Oklahoma. In this manner Stoltz could purchase two policies totalling $2 million — one $1,950,000 policy and one $50,000 policy. Flex 79 was made the owner of the policies. The insurance applications, completed by Stoltz on December 18, 1975, designated Stoltz as the insured, Flex 79 Trustee as the owners and Mr. Stoltz's estate as the beneficiaries.

In March 1976 Mr. Stoltz sought to change the beneficiary and ownership. In the required change of beneficiary forms, he named his son, James Stephen Stoltz ("Steve"), as beneficiary of both policies and owner of the larger policy. A First Pyramid employee, Elizabeth Oswald, accepted these forms. Yet, these forms were never signed by the policies' owner of record, the Flex 79 Trustee. Ms. Oswald's supervisor, Ron Mason, sent a memo in August 1976 advising Mr. Stoltz's insurance agent that the attempted policy modifications were ineffective without the Trustee's signature and that the policy should be returned to have the invalid forms removed. It is not disputed that Mr. Stoltz did nothing further after August 1976 to change the beneficiary from the estate to his son and that on his balance sheet dated October 5, 1977 (two months

prior to his death), he listed the $2 million insurance as an asset and indicated that his estate was the beneficiary. Mr. Stoltz's signature is on this balance sheet.

Mr. Stoltz died on December 18, 1977. Only his son, Steve, claimed the policy proceeds. Prior to paying the claim, First Pyramid consulted their attorney, Allan Horne. Mr. Horne concluded in a memorandum (the "Horne memorandum") that Steve Stoltz was the legal beneficiary but recommended that the proceeds be interpleaded because of uncertainties in file documentation, including the lack of the Oklahoma trustee's signature on the change of beneficiary form completed by Mr. Stoltz. At an executive meeting with First Pyramid approximately a week later, Mr. Horne concurred that paying the son without interpleader was "the best course." First Pyramid paid Steve Stoltz the entire proceeds of the policies within twenty-one days of his father's death.

Subsequently, there was a dispute with the Internal Revenue Service regarding whether the face value of the policies paid to Steve Stoltz was includable in the decedent's estate. This dispute arose because of a tax provision that dictates that if a gift is made within three years of a decedent's death, the policy is presumed to be in contemplation of death. That gift is put back into the estate for estate tax purposes. The Estate through its attorneys, Friday, Eldredge and Clark, attempted to rebut this presumption. According to Mr. Saxton, the Friday firm attorney who handled the challenge, the procedure for challenging this is to include the policy proceeds in the taxable estate and then pay the tax and file a claim for a refund.

In pursuing this refund, Mr. Saxton requested and received First Pyramid Life's file on the insurance policies at issue. In a June 27, 1983 letter to Steve Stoltz, administrator of the Stoltz estate and recipient of the insurance policy proceeds, Mr. Saxton alluded to

the question of change of beneficiary raised by First Pyramid in 1977 and the Horne memorandum concerning change of beneficiary.

Eleven years after J.P. Stoltz's death, representatives of the Estate brought this action against First Pyramid for negligence, breach of contract, bad faith as well as fraudulent concealment of the proper beneficiaries of the policies.

At trial, a jury found for the plaintiffs and awarded the estate $2 million in compensatory damages and $1 million in punitive damages. The court also assessed attorney's fees for $666,666.67. The court refused to award the twelve percent statutory penalty for unpaid insurance claims.

STATUTE OF LIMITATIONS

First Pyramid Life contends that because the action is barred by the statute of limitations, the trial court erred in denying their motion for judgment notwithstanding the verdict. As we find no evidence of fraudulent concealment on the part of First Pyramid which would toll the statute of limitations, it necessarily follows that the action is barred, and the judgment must be reversed.

Representatives of J.P. Stoltz's estate did not bring this action until April 20, 1989, more than eleven years after the payment of the insurance proceeds to Steve Stoltz and J.P. Stoltz's death.

The statute of limitations on actions to recover on a life insurance policy is five years from the accrual of the cause of action. Ark. Code Ann. § 23-79-202 (1992); 16-56-111 (1987). The limitations period on torts actions is three years. Ark. Code Ann. § 16-56-105 (1987). This court has held that the action accrues upon the death of the insured:

> It is a rule of universal application in the law of insurance that a cause of action arises in favor of the designated beneficiary in a policy of insurance against the insurer upon the death of the insured unless by the terms of the contract the accrual of such cause of action is delayed or some local statute fixes a different time.

United Mutual Life Ins. Co. v. Bransford, 190 Ark. 783, 81 S.W. 2d 17 (1935). *See also* 20A John Alan Appleman, *Insurance Law and Practice* § 11585 (1980).

Representatives of the estate contend that the statute of limitations on this action was tolled by First Pyramid's allegedly fraudulent concealment of the controversy. In response, First Pyramid denies concealment and asserts that the estate knew or should have known of the change in beneficiaries on the policies.

When the running of the limitations period is raised as a defense, the defendant has the burden of affirmatively pleading this defense. However, once it is clear from the face of the complaint that the action is barred by the applicable limitations period, the burden shifts to the plaintiff to prove by a preponderance of the evidence that the statute of limitations was in fact tolled. *Cleveland v. Gravel Ridge Sanitary Sewer Imp. Dist. No. 213,* 274 Ark. 330, 625 S.W.2d 446 (1981); *Rasmussen v. Reid,* 255 Ark. 1064, 505 S.W.2d 222 (1974); *Alston v. Bitely,* 252 Ark. 79, 477 S.W.2d 446 (1972).

During the preliminary phases of the lawsuit below, the trial court made the following findings of fact and conclusions of law:

> The cause [of] action here asserted against the First Pyramid Life Insurance Company is the estate lost the insurance benefits by reason of

> the Statute of Limitations and the company was liable in tort, a bad faith action, on the event of the payment of the proceeds.
>
> To avoid the loss of those causes of action, the plaintiff must prove either the defendant insurance company by its overt acts caused the legal right to be hidden and thereby becomes time barred; or there existed a specific legal relationship between the parties that in and of itself obligated an overt discloser [sic] of the existence of those claims. An insurer/ beneficiary relationship does not seem to create that legal obligation; however on the claim of a factual cover-up, the plaintiff should have its day in Court.

(emphasis added).

We agree with this analysis of the issues; however, we hold that the trial court should have granted First Pyramid's motion for a judgment notwithstanding the verdict because the action was barred by the statute of limitations.

There is simply no evidence of record that First Pyramid attempted to fraudulently conceal, "cover-up" or misrepresent to the estate the problem with determining the proper beneficiary of J.P. Stoltz's insurance policy. Even if there was evidence of fraud on the part of First Pyramid, and there is none, the statute of limitations would still have run on this claim. "Fraud does suspend the running of the statute of limitations, and the suspension remains in effect until the party having the cause of the action discovers the fraud *or should have discovered it by the exercise of reasonable diligence*." (Emphasis in original; citations omitted). *Talbot v. Jansen*, 294 Ark. 537, 744 S.W.2d 723 (1988). *See also*

Walters v. Lewis, 276 Ark. 286, 634 S.W.2d 129 (1982); *Carter v. Zachary,* 243 Ark. 104, 418 S.W.2d 787 (1967); *Williams v. Purdy,* 223 Ark. 275, 265 S.W.2d 534 (1954).

We have said that the "classic language on this point in Arkansas" is:

> No mere ignorance on the part of the plaintiff of his rights, nor the mere silence of one who is under no obligation to speak, will prevent the statute bar. There must be some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed or perpetrated in a way that it conceals itself. And if the plaintiff, by reasonable diligence, might have detected the fraud, he is presumed to have had reasonable knowledge of it.

Wilson v. GECAL, 210 Ark. __, __ S.W.2d __ (1992) (citations omitted).

As early as 1976, twelve years before the filing of this lawsuit, two of the complaining representatives of the estate, J.P. Stoltz's sister and brother-in-law, Ruth Fields and John R. Smith, were aware that J.P. Stoltz had taken out a $2 million life insurance policy naming his estate as beneficiary. Further, J.P. Stoltz's signed a 1976 balance sheet listed the $2 million insurance as an asset and named the estate as beneficiary. This balance sheet was made available to the beneficiaries. Armed with this information, the beneficiaries of the estate were on notice that the estate was potentially a beneficiary of the insurance policies and by the exercise of reasonable diligence, the parties could have discovered information relating to the policy and its designated beneficiaries.

There is no evidence that the beneficiaries of the estate ever requested First Pyramid's files; nor is there evidence indicating that First Pyramid tried to hide the potential problem with the insurance policies from the beneficiaries. In 1983 the attorneys who represented both the estate and Steve Stoltz requested access to the insurance company's files. First Pyramid readily turned them over. A like inquiry of First Pyramid would, in all probably, have made all files on J.P. Stoltz available to the beneficiaries as well.

The beneficiary's ignorance of their rights does not prevent the operation of the statute of limitations. The statute is tolled only when the ignorance is produced by affirmative and fraudulent acts of concealment. *Atlanta Exploration Inc. v. Ethyl Corp.*, 301 Ark. 331, 784 S.W.2d 150 (1990). The acts of concealment or fraud alleged must have been committed by those invoking the benefit of the statute of limitations. *Dupree v. Twin City Bank*, 300 Ark. 188, 777 S.W.2d 859 (1989).

The estate obviously had notice of the original beneficiary of the policies; the fact that the beneficiaries of the estate failed to act or did not know to act on this knowledge does not toll the statute of limitations. As there was an absence of fraud or concealment on the part of First Pyramid, it was entitled to the benefit of the statute of limitations.

On cross appeal, the appellee, Estate of J.P. Stoltz, complains that the trial court erred in denying the twelve percent statutory penalty provided by Ark. Code Ann. § 23-79-208 (1992) and prejudgment interest. Prejudgment interest is based upon an "improperly disallowed insurance claim." However, since we reverse the trial court's decision to award the proceeds of the policy to the estate, the Estate's argument for a statutory penalty and prejudgment interest has no basis.

Reversed on appeal; affirmed on cross appeal.

Dudley, J., not participating.

ORDER OF THE ARKANSAS SUPREME COURT
DATED FEBRUARY 5, 1993

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
ARKANSAS COURT OF APPEALS
JUSTICE BUILDING
625 MARSHALL STREET
LITTLE ROCK, AR 72201

February 5, 1993

Charles Phillip Boyd, Jr.
Attorney at Law
P.O. Box 1300
Little Rock, AR 72203-1300

Re: 92-4 First Pyramid Life Insurance Company of America v. J. Michael Stoltz, as Special Administrator of the Estate of J. P. Stoltz, Deceased

Dear Mr. Boyd:

The Supreme Court made the following order in the above styled case today:

> "Appellee's motion for vacatur, to disqualify and, in the alternative to appoint a special master is denied. See concurring opinion this date. Dudley, J., not participating."

Sincerely yours,

s/ Leslie W. Steen
Leslie W. Steen, Clerk

LWS:rh
Enclosure
cc: Peter G. Kumpe
& John E. Tull III
William C. Brazil
Vincent Foster, Jr.
& Michael Booker
Edgar J. Tyler
Robert Keller Jackson

[stamped]
RECEIVED
FEB 17 1993

MOTION FOR STAY
FILED FEBRUARY 18, 1993
WITH EXHIBITS

IN THE ARKANSAS SUPREME COURT

NO. 92-4

FIRST PYRAMID LIFE INSURANCE COMPANY OF AMERICA; USABLE INSURANCE COMPANY

VS.

J. MICHAEL STOLTZ, As Special Administrator of the Estate of J.P. Stoltz, Deceased

MOTION FOR STAY

Comes the Estate, by and through its attorneys, Davidson Law Firm, Ltd., and for its Motion to Stay proceedings does state as follows:

1. The Estate filed a *Motion for Vacatur, To Disqualify And, In The Alternative, To Appoint A Special Master* due to serious questions that had come to light concerning Chief Justice Jack Holt, Jr., being a regular quest of Mr. Herschel Friday of the Friday Law firm, and hunting excursions that had taken place through the years, including the period of time this matter was pending on Appeal. The basis for said Motion has been exhaustively briefed, and will not be spelled out herein again.

2. We are not dealing with a "casual social friendship" where pleasantries are exchanged during meetings that occurred by happenstance, or because a Judge and litigant/lawyer are members

of the same group or organization. The Estate prayed that Special Master be appointed to investigate fully the nature and depth of the relationship between Mr. Friday and Judge Holt, the number of times Judge Holt has been a personal *guest* on Mr. Friday's property, as well as the nature and extent of other activities these individuals have partaken in evidencing same. The Estate believes it has the right, under these circumstances, to learn the full extent of the true facts concerning same, while at the same time stating the activities spelled out in the prior pleadings mandate a recusal in and of themselves. The Estate purposefully refused to include hearsay, rumors, and innuendos regarding same in its pleadings, and numerous requests from the media to comment on these proceedings, choosing instead to await the true facts.

3. The Supreme Court, in a "Concurring Opinion" written by Judge Holt, refused to grant the Motion, and refused to appoint a Special Master. A Motion for Reconsideration of said Opinion is being filed contemporareously with this pleading.

4. J. Michael Stoltz, as Special Administrator of the Estate of J.P. Stoltz, has filed a Complaint with the Arkansas Judicial Discipline & Disability Commission against Chief Justice Holt, alleging as a basis for same that Judge Holt's relationship and personal outings with Mr. Friday mandated that Judge Holt recuse himself from further participation in these proceedings, and that his refusal to do so, compelled with the fact that he is the author of the December 21, 1992 Opinion, is a violation of the Arkansas Code of Judicial Conduct. This Commission has the ability to investigate this matter under power of subpoena, and can in essence perform an independent investigation into the matters raised by the Estate in support of their Motion for Vacatur. In other words, the Commission can perform the same task as a Special Master. A copy of Mr. Stoltz's Complaint is attached hereto as Exh. A.

5. The Estate respectfully states that this Court should not render a decision on the Petition for Rehearing until the Arkansas Judicial Discipline & Disability Commission has had the opportunity to investigate this matter, and apprise all parties of the true facts concerning same. If the Commission finds that Judge Holt should have recused, or that an ethical violation has occurred, same would cause one to seriously question the validity of this Court's Opinions in these proceedings. One can only wander where the parties would stand if the Commission were to make such a ruling after the Petition for Rehearing was decided by this Court, thus ending these proceedings.

6. The only alternative for the Estate is to seek an injunction in Federal Court staying further action by this Court until the Arkansas Discipline & Disability Commission has conducted its inquiry. The Opinion from this Court denying the Motion for Vacatur was not received by the undersigned until Wednesday, February 17, 1993, which has afforded him only limited time to investigate said procedure. There is precedent for such an action, but same would undoubtedly bring further publicity to these proceedings which the undersigned counsel would hope to avoid by this Court voluntarily agreeing to stay these proceedings pending the aforementioned inquiry.

7. The failure of this Court to voluntarily stay further actions in these proceedings would constitute a potential denial of due process and the 14th Amendment to the U.S. Constitution, and a potential denial of a fair and impartial opportunity by the Estate to be heard before this Court. If there is nothing to be gleaned from the inquiry of the aforementioned Commission, then this Court should welcome the opportunity to be exonerated in the eyes of all those watching these proceedings.

8. Attached hereto as Exh. B is an Affidavit in accordance with Rule 3 of the Rules of the Supreme Court.

WHEREFORE, the Estate respectfully prays that this Court stay further proceedings in this matter, and voluntarily agree not to render a decision on the Petition for Rehearing until after the Arkansas Judicial Discipline & Disability Commission has fully investigated the Complaint filed by J. Michael Stoltz against Chief Justice Holt, and, in the alternative, to stay same pending an opportunity for a thorough investigation into potential Federal Court intervention, and for all other relief to which it is justifiably entitled.

Respectfully submitted,

DAVIDSON LAW FIRM, LTD.
P.O. Box 1300
Little Rock, Arkansas 72203-1300
Telephone: (501) 374-9977

By: s/ Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.
Bar No. 82023

CERTIFICATE OF SERVICE

I, Charles Phillip Boyd, Jr., do hereby certify that the above and foregoing has been mailed by ordinary mail with sufficient postage affixed thereon, on this the 18th day of February, 1993, to:

Peter G. Kumpe
Williams & Anderson
400 Rogers Building
111 Center Street
Little Rock, AR 72201

s/ Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.

CPBjr:emk:2066B

EXHIBIT A

Arkansas Judicial Discipline & Disability Commission
Tower Building - Suite #1060 - 323 Center Street
Little Rock, Arkansas 72201
Phone: (501) 682-1050

COMPLAINT

I hereby request an investigation of Judge Jack Holt, Jr. of the Arkansas Supreme Court in Little Rock, Pulaski, Arkansas.

On information and belief, I state that the above-named judge:

_X_ 1. Has engaged in unethical and improper conduct as a judge.

* * *

_X_ c. Conflict of interest/failure to disqualify

_X_ 2. Has willfully or persistently failed to perform an official duty by:

* * *

_X_ c. Abuse of judicial power
(includes a knowing or persistent disregard of clear law or fundamental rights)

_X_ d. Legal error/improper procedure
(includes dissatisfaction with court procedures or rulings on evidence, criminal sentences, custody, etc.)

* * *

__x__ f. Procedural or administrative irregularity

__x__ 3. Has engaged in gross *personal* misconduct.

__x__ a. Misconduct (off the bench)
(includes prohibited charitable, business, personal, political or criminal conduct)

* * *

__x__ 6. Other (specify). See enclosed pleadings of my attorneys.

Date: Through the years and while appeal was pending

* * *

Location: Unknown

* * *

Name: *J. Michael Stoltz, on behalf of the Estate of J.P. Stoltz, deceased*

Address: *25 St. Andrews Drive*
Little Rock, AR 72212

Phone: Daytime *(501) 221-6341* Evening *(501) 221-9503*

Date: *February 18, 1993*

STATEMENT OF FACTS

1. Specify below the details of what the judge did that you think constitutes misconduct or indicates disability. (Please type or print legibly.)

This case involves my Father's Estate, and insurance proceeds that were wrongfully paid to my older brother, Steve. I am attaching a copy of all documents that have been filed by my attorneys after the Court's Opinion. These documents explain in detail the "legal" issues involved, and the facts to support my contention that Judge Holt is guilty of unethical conduct.

A Pulaski County Circuit Court jury decided that the insurance company had committed fraud by knowingly disregarding the advice of its attorneys, and not alerting the Estate to its potential claim by interpleading $2,000,000 of life insurance proceeds back in 1978 when my Father died so that the Estate could present a claim. The Friday Law Firm was a potential Defendant to those proceedings. My attorneys and I decided not to sue the Friday Law Firm if they would agree to sign a "Tolling Agreement" stating that they would not use the statute of limitations as a defense from the date of the agreement forward. We

decided we would pursue the case against the insurance company alone for the time being.

The Friday Firm had an interest in the ultimate outcome of these proceedings. It represented my brother, Steve, personally and as Executor of the Estate. This law firm also represented the insurance company that wrongfully paid the proceeds to Steve, and many other parties that had conflicts of interest. The Friday Firm had access to documents from the insurance company, and actually reviewed them, indicating the Estate was the rightful beneficiary to these insurance proceeds yet did not tell the Estate because that would have exposed its "other" client, First Pyramid Life, to a suit for paying the wrong person. The Friday Firm believes the Supreme Court's Opinion helps insulate them from a legal malpractice lawsuit. The Friday Firm would have been sued by the insurance company if the jury's verdict had been upheld, and would have been sued by Steve, who had signed an Indemnity Agreement when he received the money from the insurance company, had the jury verdict been upheld. During oral arguments before the Arkansas Supreme Court, Justice Corbin pointedly asked, "Why haven't you sued the Friday Law Firm. The pleadings from my attorneys explain the Friday Firm's exposure in detail.

Chief Justice Jack Holt, Jr. wrote an Opinion that overturned the jury verdict and dismissed our lawsuit. Shortly after the Supreme Court's Opinion, I heard that Jack Holt, Jr. had a very close personal relationship with members of the the Friday Law Firm, specifically Herschel Friday, and that these two individuals routinely went on hunting trips together. This seemed unethical to me, and I instructed my lawyers to investigate the matter and apprise me of my legal rights.

An investigation of this matter by my attorneys turned up the fact that Jack Holt, Jr. and Mr. Friday had indeed hunted together through the years, including the period of time when this case was

on Appeal to this Court. The Appeal was filed on September 10, 1991, and is not final yet.

We do not know all the facts concerning the extent of Judge Holt's relationship with Herschel Friday. We asked the Supreme Court to appoint a "Special Master" to investigate this matter if it refused to voluntarily disqualify itself. The Supreme Court issued a "Concurring Opinion" which I am enclosing denying our Motion and refusing to appoint a Special Master to uncover the facts concerning Judge Holt's relationship with Herschel Friday. We feel that the hunting excursions alone are enough to cause one to question Judge Holt's impartiality. We deem the Supreme Court's refusal to acknowledge the extent of the relationship between Judge Holt and Herschel Friday, and deny their hunting trips together, as appalling and as an admission of guilt.

I am asking the Arkansas Judicial Discipline & Disability Commission to investigate what I believe to be a serious ethical violation. Judge Jack Holt, Jr. should have stepped down like Judge Dudley did. I am also asking that the extent of the relationshp between Judge Holt and the Friday Law Firm be fully explored and the details spelled out for the public he serves. Judge Holt's involvement in these proceedings causes me, and my family, to question the fairness and impartiality of his Opinion, and indicates to me that the Supreme Court is more interested in political favors and social friendships than justice for the citizens of the State of Arkansas.

* * *

a) What is the name and number of the case?

Case name: *First Pyramid Life, et al. v. Stoltz*
Case No.: *92-4*

b) What kind of case is it? *civil*

c) What is your relationship to the case?
plaintiff/petitioner

d) If you were represented by an attorney in this matter at the time of the Judge's conduct, please identify the attorney:

Name: *Charles Phillip Boyd, Jr.*

Address: *Davidson Law Firm, Ltd.*
P.O. Box 1300
Little Rock, AR 72203

Phone: *(501) 374-9977*

e) Identify any other attorney(s) who represented you or any other person involved in the case:

Name: *Charles Darwin Davidson*

Address: *Davidson Law Firm, Ltd.*
P.O. Box 1300
Little Rock, AR 72203

Phone: *(501) 374-9977*

Represented: *J. Michael Stoltz, Appellee*

4. List documents you have attached that help support your allegation that the judge has engaged in misconduct or has a disability:

Arkansas Supreme Court's Opinion of December 21, 1992

Motion for Vacatur, To Disqualify And, In The Alternative, To Appoint A Special Master, And Motion For Extension Of Time To File Petition For Rehearing & Brief

Petition and Brief For Rehearing

Appellant's Brief In Reply To Motion For Vacatur, To Disqualify And In The Alternative, To Appoint A Special Master

Appellant's Response To Petition And Brief For Rehearing

Reply To Appellants' Brief In Reply To Motion For Vacatur, To Disqualify And, In The Alternative, To Appoint A Special Master, And Appellants' Response To Petition And Brief For Rehearing

Arkansas Supreme Court's Concurring Opinion of February 15, 1993

5. List documents that are not attached and should be obtained by the Commission that help support your allegation(s) and may aid in the Commission's investigation:

1) *Any log, or other documentation, listing people or guests who have been hunting on Mr. Friday's farm at Mayflower for the past 5 years;*

2) *Log records indicating when Mr. Friday, or someone from the Friday Law Firm, and Mr. Holt, have flown together;*

3) *Lease documents for all the leases Judge Holt and Mr. Friday have had in the State of Texas, or elsewhere during the past 5 years for hunting purposes;*

4) *Any records indicating trips by Mr. Friday and Judge Holt to Oaklawn in Hot Springs;*

5) *Any documentation evidencing Judge Holt's review of the record in these proceedings prior to, or after, he wrote his Opinion of December 21, 1992;*

6) *Any and all documentation indicating, or evidencing, the nature or extent of Judge Holt's relationship with the Friday Law Firm, including but not limited to Mr. Herschel Friday.*

* * *

EXHIBIT B

AFFIDAVIT

Comes the undersigned and does hereby solemnly state under oath the following facts and information are true and correct to the best of my knowledge and belief:

1. I am one of the attorneys representing the Estate in the matter styled First Pyramid Life Insurance Company Of America; USAble Insurance Company vs. J. Michael Stoltz, As Special Administrator of the Estate of J.P. Stoltz, Deceased, Ark. Supreme Court No. 92-4.

2. I filed a Motion For Vacatur, To Disqualify And, In The Alternative, To Appoint A Special Master in these proceedings.

3. The reason for the request that a Special Master be appointed if this Court would not voluntarily step down was so that the true facts underlying the number of times Chief Justice Holt has been a guest of Mr. Friday's on his private hunting farm outside of Mayflower, Arkansas, as well as other activities partaken by these individuals, could be fully discovered and made publicly known.

4. The Court rendered a decision on February 15, 1993 denying the Estate's request that it disqualify itself, and refusing to appoint a Special Master. The questions concerning Judge Holt's relationship with Mr. Friday were left unanswered.

5. Upon receipt of this Opinion, J. Michael Stoltz made the decision to file a Complaint with the Arkansas Judicial Discipline & Disability Commission. It is the undersigned's understanding that said Commission has the ability to ascertain the facts and information requested by the Estate in its pleadings filed before this Court.

6. It is the undersigned's sincere belief that this Court should not render a decision on the Petition for Rehearing, nor any further decisions on the merits of this matter pending the completion of the investigation by the Commission, and that it would severely damage the Estate's ability to seek a fair and impartial hearing before this Court should facts mandating a recusal be discovered by the Commission after this Court's Opinion has become final.

s/ Charles Phillip Boyd, Jr.
CHARLES PHILLIP BOYD, JR.

VERIFICATION

I, Charles Phillip Boyd, Jr., the undersigned, do hereby state under oath that the statements set forth hereinabove are true and correct to the best of my information, knowledge and belief.

s/ Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.

SUBSCRIBED AND SWORN TO before me a Notary Public, on this the 18th day of February, 1993.

s/ Edwina K. Bell
NOTARY PUBLIC

My Commission Expires;
12-1-95
CPB, jr: emk: 067B

s/ Charles Phillip Boyd, Jr.
CPB, JR.

ORDERS OF THE ARKANSAS SUPREME COURT DATED FEBRUARY 22, 1993

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
ARKANSAS COURT OF APPEALS
JUSTICE BUILDING
625 MARSHALL STREET
LITTLE ROCK, AR 72201

February 22, 1993

Charles Phillip Boyd, Jr.
Attorney at Law
P.O. Box 1300
Little Rock, AR 72203-1300

Re: 92-4 First Pyramid Life Insurance Company of America v. J. Michael Stoltz, as Special Administrator of the Estate of J. P. Stoltz, Deceased

Dear Mr. Boyd:

The Supreme Court made the following orders in the above styled case today:

"Petition for Rehearing is denied.
Dudley, J., not participating."

"Appellee's motion for stay is denied.
Dudley, J., not participating."

"Appellee's motion for reconsideration of Motion for Vacatur, to Disqualify and, in the alternative, to Appoint a Special Master, is

denied. The appellee's initial motion (Motion for Vacatur) was denied by the court without written opinion. In his present motion, the appellee characterizes the concurring opinion filed by Chief Justice Holt as the court's opinion which is incorrect. The concurring opinion filed by Chief Justice Holt was his written concurrence with the court's denial of appellee's original motion.
Dudley, J., not participating."

Sincerely yours,

s/ Leslie W. Steen
Leslie W. Steen, Clerk

LWS:rh

cc: Peter G. Kumpe
& John E. Tull III
William C. Brazil
Vincent Foster, Jr.
& Michael Booker
Edgar J. Tyler
Robert Keller Jackson

MOTION FOR STAY OF MANDATE
FILED FEBRUARY 22, 1993

IN THE ARKANSAS SUPREME COURT

NO. 92-4

FIRST PYRAMID LIFE INSURANCE COMPANY OF AMERICA; USABLE INSURANCE COMPANY

APPELLANTS

VS.

J. MICHAEL STOLTZ, As Special Administrator of the Estate of J.P. Stoltz, Deceased

APPELLEE

MOTION FOR STAY OF MANDATE

COMES J. Michael Stoltz, as Special Administrator of the Estate of James Patrick Stoltz, deceased, and for his Motion does state as follows:

1. The Supreme Court announced in open court on February 22, 1993 that it was denying all Motions currently pending before the Court in these proceedings, including the Petition for Rehearing filed by the Appellee/Cross Appellant, J. Michael Stoltz.

2. In accordance with Rule 22 of the Rules of the Supreme Court, J. Michael Stoltz respectfully states that he intends to prosecute these proceedings to the Supreme Court of the United States. He also intends to investigate pursuing a cause of action in Federal Court, if same can be brought under the facts and the law as he believes same exist in the case at bar.

3. A $50.00 deposit has been placed with the Clerk of this Court for a copy of the record in these proceedings, and same is hereby ordered in accordance of Rule 22 (c) of the Rules of the Supreme Court.

4. J. Michael Stoltz pledges to expeditiously move forward in these proceedings so that the litigants in question not experience any undue delay.

5. The Appellee, J. Michael Stoltz, respectfully prays that the record of the lower court proceedings be properly lodged with the records' clerk of this Court so that same is not lost, misplaced, or disposed of during the aforementioned proceedings.

WHEREFORE, J. Michael Stoltz, as Special Administrator of the Estate of James Patrick Stoltz, respectfully prays that the mandate of this court be stayed pending further prosecution of these proceedings, including but limited to prosecution of same to the Supreme Court of the United States, that the record of the lower court proceedings in these proceedings be kept and preserved, and for all other relief to which is justifiably entitled.

Respectfully submitted,

DAVISON LAW FIRM, LTD.
P.O. Box 1300
Little Rock, AR 72203-1300
Telephone: (501) 374-9977

By: s/ Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.
Bar No. 82023

CERTIFICATE OF SERVICE

I, Charles Phillip Boyd, Jr., do hereby certify that the above and foregoing has been mailed by ordinary mail with sufficient postage affixed thereon, on this the 22nd day of February, 1993, to:

Peter G. Kumpe
Williams & Anderson
400 Rogers Building
111 Center Street
Little Rock, Arkansas 72201

s/ Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.

CPB:cwu:2075B

MOTION TO SUPPLEMENT RECORD FILED MARCH 12, 1993 WITH EXHIBITS

IN THE ARKANSAS SUPREME COURT

NO. 92-4

FIRST PYRAMID LIFE INSURANCE COMPANY OF AMERICA; USABLE INSURANCE COMPANY

APPELLANTS

VS.

J. MICHAEL STOLTZ, As Special Administrator of the Estate of J.P. Stoltz, Deceased

APPELLEE

MOTION TO SUPPLEMENT RECORD

Comes the Appellee, J. Michael Stoltz, as Special Administrator of the Estate of James Patrick Stoltz, deceased, and for his Motion does state as follows:

1. All pleadings previously filed before this Court are incorporated herein, by reference.

2. The basis for the Supreme Court's Opinion overturning the jury's findings of fact in these proceedings is, in essence, an allegation of what the record did not contain; i.e. evidence of fraud on the part of the Appellant and a concurrent tolling of the statute of limitations.

3. The Appellee's post-Opinion pleadings challenging the substantive merits of the Court's Opinion were geared towards

alerting the Court to specific and unequivocable evidence of fraud in the record, and testimony/documentation from which fraud can be properly inferred, and a jury instruction which states in plain English that if the Estate was the proper beneficiary (as the jury found), then the Appellant was guilty of fraud and the statute of limitations was tolled. The Court granted a Motion made by the Appellee specifically requesting an enlargement of the page limit prescribed by the Rules in order to point out this information in the voluminous record. The task was painstaking and arduous and, when completed would allow any reader to pinpoint substantial evidence of fraud quickly and efficiently.

4. The Records Clerk of the Arkansas Supreme Court apprised counsel for the Appellee in passing that the record in these proceedings had not been checked out by any Justice of this Court subsequent to the Court's Opinion which was delivered on December 21, 1992. The fact that a "log" record of such matters was kept was inadvertently discovered by the Appellee after the Petition for Rehearing was denied by this Court. Attached hereto as Exhs. A and B are Affidavits from Appellee's counsel, and his secretary, in support of this Motion.

5. The Records Clerk originally agreed to sign an Affidavit verifying these facts, but has since either declined, or chosen for other reasons not to sign said Affidavit. The bottom line is no Affidavit is forthcoming, thus leaving the Appellee no alternative method of ensuring these facts are of record in these proceedings.

6. The Appellee is pursuing avenues of further Appellate Court review based on a denial of due process, or additional legal proceedings. Appellee's counsel does not want to appear unduly adversarial with this Court when same would serve no useful purpose. He simply feels this is a fact that needs to be in the record should a higher Court review same.

WHEREFORE, the Appellee respectfully prays that the record in these proceedings be supplemented, and for all other relief to which he is justifiably entitled.

Respectfully submitted,

DAVIDSON LAW FIRM, LTD.
P.O. Box 1300
Little Rock, Arkansas 72203-1300
Telephone: (501) 374-9977

By: s/ Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.
Bar No. 82023

CERTIFICATE OF SERVICE

I, Charles Phillip Boyd, Jr., do hereby certify that the above and foregoing has been mailed by ordinary mail with sufficient postage, affixed thereon, on this 11th day of March, 1993, to:

Peter G. Kumpe
Williams & Anderson
400 Rogers Building
111 Center Street
Little Rock, AR 72201

s/ Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.

CPBjr:emk:2167B

EXHIBIT A

AFFIDAVIT

Comes the undersigned and does hereby solemnly state under oath the following facts and information are true and correct to the best of my knowledge and belief:

1. I am one of the attorneys for the appellee in the case of *Stoltz v. First Pyramid Life, et al.*, Arkansas Supreme Court No. 92-4.

2. Ms. Jeanne Matthews, the "Records Clerk" for the Arkansas Supreme Court, apprised me in passing that she has a log of *anyone* who checks out the record of any case after the Supreme Court has rendered its decision/Opinion on any matter.

3. She apprised me that no Justice of the Arkansas Supreme Court, nor anyone in their behalf, has checked out the record in these proceedings since the Court's Opinion of December 21, 1992.

4. Ms. Matthews originally agreed to sign an Affidavit to this effect. She subsequently indicated that this issue would need to be cleared with the Clerk of the Court, and that she would sign same if permission from him was granted. At all points in time, Ms. Matthews was told that she was under no obligation to the undersigned, or his clients, to sign same.

5. Ms. Matthews apprised me, in the presence of my secretary, that the Affidavit attached hereto as Exh. 1 is true and accurate, but that she had decided not to sign same without the approval of the Clerk of the Court and/or the Court.

6. The Clerk of this Court has apprised me that no Affidavit would be signed by Ms. Matthews.

s/ Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.

VERIFICATION

I, Charles Phillip Boyd, Jr., the undersigned, do hereby state under oath that the statements set forth hereinabove are true and correct to the best of my information, knowledge and belief.

s/ Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.

SUBSCRIBED AND SWORN TO before me a Notary Public, on this the 11th day of March, 1993.

s/ Cindy MacCallih
NOTARY PUBLIC

My Commission Expires:
12-1-95
CPB, jr.: emk: 2168B
exhibit b

EXHIBIT 1

AFFIDAVIT

Comes the undersigned and does hereby solemnly state under oath the following facts and information are true and correct to the best of my knowledge and belief:

1. My name is Jeanne Matthews. I am the Records Supervisor for the Arkansas Supreme Court.

2. I am familiar with the case of *First Pyramid Life, et al. v. Stoltz,* 92-4. If this matter had been checked out to one of the Arkansas Supreme Court Judges after the decision came down on December 21, 1992, I would have a "log record" of same. Upon checking my records, I see that this record was never checked out to any Supreme Court Justice of the Arkansas Supreme Court after the decision came down on December 21, 1992.

_____

VERIFICATION

I, _____, the undersigned, do hereby state under oath that the statements set forth hereinabove are true and correct to the best of my information, knowledge and belief.

_____

SUBSCRIBED AND SWORN TO before me a Notary Public, on this the __ day of _____, 1993.

_____
NOTARY PUBLIC

My Commission Expires:

_____

CPB, jr.: emk:2090B

EXHIBIT B

AFFIDAVIT

Comes the undersigned and does hereby solemnly state under oath the following facts and information are true and correct to the best of my knowledge and belief:

1. I am the legal secretary and legal assistant to Charles Phillip Boyd, Jr., one of the attorneys for the Appellee in the case of *Stoltz v. First Pyramid Life, et al.*, Arkansas Supreme Court No. 92-4.

2. I traveled with Mr. Boyd to the office of the Records Clerk of the Arkansas Supreme Court, Ms. Jeanne Matthews, during the latter part of February, 1993.

3. Ms. Matthews told myself and Mr. Boyd that the Affidavit prepared for her, and attached to Mr. Boyd's Affidavit as Exh. 1 was true and correct, but that she had decided to seek the permission of the Clerk of the Court, or the Court itself, prior to signing same.

4. Mr. Boyd at all times apprised Ms. Matthews that she was under no obligation to sign the Affidavit in question, and that he was not, and would not, request that she sign any document that did not document the unmitigated truth.

s/ Edwina M. Keith
Edwina M. Keith

VERIFICATION

I, Edwina M. Keith, the undersigned, do hereby state under oath that the statements set forth hereinabove are true and correct to the best of my information, knowledge and belief.

s/ Edwina M. Keith
Edwina M. Keith

SUBSCRIBED AND SWORN TO before me a Notary Public, on this the 11th day of March, 1993.

s/ Cindy Marie Callih
NOTARY PUBLIC

My Commission Expires:
12-1-95
CPB, jr.: emk:2169B

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS)
In the Supreme Court) SCT.

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 5th day, being the first Monday of October, A.D. 1992, amongst others were the following proceedings, to-wit:

On the 15th day of March, A.D. 1993, a day of said term

No. 92-4

FIRST PYRAMID LIFE INSURANCE CO. OF AMERICA

APPELLANT

vs.

J. MICHAEL STOLTZ, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF J.P. STOLTZ, DECEASED

APPELLEE

Appeal from Pulaski Circuit Court Second Div. District
(Circuit Court Case No. 89-2464)

Appellee's motion for stay of mandate is denied.

Holt, C.J. and Dudley, J., not participating.

[stamped]
IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case herein stated, I, Leslie W. Steen, Clerk of said Supreme Court, hereunto set my hand and affix the seal of said Supreme Court, at my office in the city of Little Rock, this 15th day of March, A.D. 1993

s/ Leslie W. Green
CLERK

MANDATE
REVERSED LAW

STATE OF ARKANSAS,

In the Supreme Court

BE IT REMEMERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 5th day, being the first Monday of October, A.D. 1992, amongst others were the following proceedings: on the 21st day of December, A.D. 1992, a day of said term:

92-4

FIRST PYRAMID LIFE INSURANCE COMPANY OF AMERICA

APPELLANT

V.

J. MICHAEL STOLTZ, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF J. P. STOLTZ, DECEASED

APPELLEE

Appeal from Pulaski Circuit - 89-2464

This cause came on to be heard upon the transcript of the record of the Circuit Court of Pulaski County, and was argued by the counsel; on consideration whereof it is the opinion of the Court that there is error in the proceedings and judgment of said Circuit Court in this cause as set out in the opinion wherein delivered.

It is therefore considered by the Court that the judgment of said Circuit Court in this cause rendered be, and the same is hereby, Reversed on Appeal; Affirmed on Cross Appeal with costs in accordance with the opinion herein delivered.

It is further considered that said appellant recover of said appellee all its costs in this Court in this cause expended, and have execution thereof.

Dudley, J., not participating.

COSTS ON APPEAL

Appellant's brief	$500.00
Filing fee	$100.00
Record	$5,366.97

IN TESTIMONY, that the above is a true copy of the judgment of said Supreme Court in the case therein stated. I, Leslie W. Steen, Clerk of said Supreme Court, hereto set my hand and affix the seal said Court, at my office in the City of Little Rock, this 15th day of March, A.D. 1993.

s/ Leslie W. Steen
Clerk

ORDER OF THE ARKANSAS SUPREME COURT
DATED APRIL 6, 1993

Office of the Clerk
Supreme Court of the State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, AR 72201

April 5, 1993

Charles Phillip Boyd, Jr.
Attorney at Law
P.O. Box 1300
Little Rock, AR 72203-1300

Re: 92-4 First Pyramid Life Insurance Company of America v. J. Michael Stoltz, as Special Administrator of the Estate of J.P. Stoltz, Deceased

Dear Mr. Boyd:

The Supreme Court made the following order in the above styled case today:

> "Appellee's motion to supplement the record is denied. See per curiam this date. Holt, C.J., and Dudley, J., not participating."

Sincerely yours,

s/ Leslie W. Steen
Leslie W. Steen, Clerk

LWS:rh
Enclosure
cc: Peter G. Kumpe
William C. Brazil
Robert Keller Jackson
Edgar J. Tyler
Vincent Foster, Jr.
& Michael Booker

ORDER OF THE SUPREME COURT OF THE UNITED STATES DATED MAY 20, 1993

Supreme Court of the United States
No. A-873

J. Michael Stoltz,

Petitioner

v.

First Pyramid Life Insurance Company, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including July 22, 1993.

s/ Harry A. Blackmun
Associate Justice of the Supreme
Court of the United States

Dated this 20th
day of May, 1993.

SUPPLEMENTAL ABSTRACT OF RECORD (ATTACHED AS EXHIBIT A TO BRIEF IN SUPPORT OF *MOTION FOR VACATUR, ET AL.* AND FILED WITH ARKANSAS SUPREME COURT)

WITNESSES' TESTIMONY

Merl Scheffey: The Estate was the contractually designated beneficiary. (R.3690)

Charles Boling: I worked for First Pyramid Life from 1974 until it was sold in 1984, and am familiar with the Flex 79 Trust product. (R.3792-93) An insurance company has the obligation to contact an entity if that entity has no knowledge of a claim to insurance proceeds. It is a responsilibity "*recognized in the industry.*" (R.3833)

Mike Rainwater: I am a practicing attorney in Little Rock and was engaged in September, 1987 to represent certain members of the Stoltz family with regard to a probate proceeding in Faulkner County. I came across the documents indicating the Estate was the proper beneficiary *on August 8, 1988* when we received the Estate filed *under Court Order. We had propounded discovery to the Friday Firm seeking these files, and the Court ultimately ordered production of same.* (R.3864-65) The members of the family I represented were told about the Estate's claim that afternoon and could not believe it. One started crying. (R.3867) *The documents naming the Estate as the beneficiary were in the hands of the Friday Law Firm, who represented Steve Stoltz.* (R.3873) I had been working with my clients for almost a year, and we had no idea the insurance belonged to the Estate. These documents were a complete surprise. (R.3874-75) My clients had no indication the Estate had a claim to these proceeds prior to August 8, 1988, when the Estate files and an October 5, 1977 Balance Sheet were produced. (R.3876)

William Webster: I have 33 years of corporate trust work, and 5 years experience as a Trust consultant. I'm past chairman of the Trust section for the Arkansas Bankers Association, and for 3 years was on the Committee of the Trust Division of the Arkansas Bankers Association. (R.3880-81) *The Friday firm represented people/entities with conflicting and adverse interests that could not be properly represented by one law firm, i.e. Steve Stoltz, individually and as Executor, First National Bank as Trustee of Residuary Trust which would have received the proceeds had the Estate been paid, and First National Bank as the largest creditor of the Estate.* (R.3891/3907) The First National Bank should have been apprised of the Estate's claim to the insurance proceeds and was not. (R.3889-90, 3904-05) *The Executor's, and the attorney's for the Estate, responsibilities to the heirs and beneficiaries of the Estate is not fulfilled by maintaining contact with the beneficiaries themselves, or obtaining their acquiescence.* The First National Bank should have been informed because they are skilled fiduciaries with the requisite knowledge and experience to defend the position and the property rights of the beneficiary of *the* Trust. (R.3895) The information in the June 27, 1983 letter from *James Saxton to Steve Stoltz*, apprising him the Estate had a potential claim to the insurance proceeds, was *never imparted to the First National Bank*, the Trustee for the heirs of the Estate. (R.3943)

Robert Grant: I am a Trust officer at First Commercial Trust Company and have been there for 26 years. (R.3945) *The Friday Firm represented the Estate and the Estate's largest creditor, First National Bank. Herschel Friday was on the board of First National Bank as was Herbert Thomas, the majority stockholder of First Pyramid Life (FPL).* (R.3947-48) We would have accepted the appointment of Trustee in 1978, had we been apprised of the Will and the Trust. (R.3949) We were never given the pertinent documents listing the potential assets of the Estate. We never signed a Waiver of Accounting waiving our right to see accountings dealing with assets of the Estate. I saw the two memos

from Allan Horne and John Peace, and the June 27, 1983 letter from James Saxton to Steve Stoltz telling the Estate of its potential claim, for the first time at my deposition on January 31, 1990. I have never seen the insurance policy. If we had known this, we would have made a claim for the money. (R.3950-53) *At no point in time were we ever apprised by anyone that the Estate had a potential claim to these proceeds, or that there was any controversy concerning the proper beneficiary.* (R.3949, 3959-60)

Ron Mason: I worked for First Pyramid from October of 1974 to October, 1979 and am familiar with the Flex 79 product. (R.4006-07) There was a controversy at First Pyramid Life regarding the proper beneficiary under the policy after the death of J.P. Stoltz. The memos from Allan Horne and John Peace describing the controversy are dated the same day as the meeting where FPL decided to pay Steve. (R.4081-82) In an interpleader action, everybody with a claim is alerted and comes forward. *First Pyramid Life was told by Allan Horn that interpleading the money was the safest course, but that the insurance company would be opening itself up to a suit by the loser.* (R.4083-84) The memo from Allan Horne indicates there is a "substantial risk" to FPL regardless of who is paid, and is dated the same day this "consensus" on whom to pay was allegedly reached. (R.4084)

Elizabeth Oswald: I worked for FPL from 1956 until 1987. (R.4087) I know what an interpleader is from my work in the insurance industry. I would have expected First Pyramid Life to follow the advice of their attorneys and interplead the money. It would surprise me if they didn't. I never saw Allan Horne's memo prior to my recent deposition. (R.4125-27) I cannot explain Plaintiff's Exh. 26, which is a blank Change of Beneficiary form, dated March 22, 1976, which contains my signature and that of Gene Chadwick, but not that of James Patrick Stoltz. (R.4128)

John Copeland: I am a lawyer and teach law at the University of

Arkansas at Fayetteville. (R.4223) An insurance company has a contractual obligation to pay the proper beneficiary. The obligation does not expire until the proper beneficiary is in fact paid, even if same occurs 15 years down the road. (R.4284-85)

Jim Duran: I worked for First Pyramid for 17 years, and was supervisor of claims when this policy was paid. (R.4319) I have identified the policies in question as exhibits for the jury as if a Rider changing the beneficiary from the Estate to the son was included when the policy was presented for payment, when in fact no Change of Beneficiary Rider was found with the policies at the time of J.P. Stoltz' death. (R.4334) A new policy was issued in August, 1976, showing the Estate as the beneficiary, as per Allan Horne's memo. I have not shown this policy to the jury because I don't have it. (R.4339) An insurance company does not fulfill its contractual obligations until it pays the contractually designated beneficiary. (R.4349) *The meeting where we decided to pay Steve Stoltz occurred on January 18, 1978, the same date as the Allan Horne and John Peace memos noting the discrepancy in the proper beneficiary, and the same day as Defendant's Exh. 20, the handwritten summary of the meeting written by John Shields.* (R.4342, 4353) First Pyramid Life's actions may have been different had the Estate made a claim to the proceeds in 1978. The interpleader action recommended by Allan Horne would have alerted the Estate to its claim. Nobody but the son was ever told by First Pyramid Life they had a potential claim to the proceeds. *The Estate had no way of knowing they had a right to make a claim to the proceeds because we did not tell them. An interpleader action would have alerted the Estate to its claim, but it would also have exposed the company to a suit.* (R.4354-55) We had someone sign an indemnity agreement when we knew someone else had a potential claim to the money in order to reduce any future exposure we may have. (R.4358-62) There is no indication Steve Stoltz, age 25, was told about the memos from our lawyers outlining the potential controversy when we had him sign an indemnity

agreement representing no one else had a claim to the proceeds and paid him the money. (R.4362-63)

Paul Dixon: I was employed back in 1975 and 1976 by Diversified Financial Services, an agency which sold insurance. (R.4378). I have no idea how the alleged Change of Beneficiary forms were allegedly signed March 1, 1976, when they were mailed by me in blank to the insured on March 5, 1976. (R.4401) *The Friday Firm represented the agency I worked for when this claim was processed.* (R.4401-2) *The insurance company never told me they had received memos from their attorneys outlining any controversy regarding the proper beneficiary.* (R.4412) *As the agent who processed this claim, I would have told Steve Stoltz had I known of the memos from Allan Horne and John Peace documenting the discrepancy in the proper beneficiary because that's the only honest thing to do.* (R.4413) I sold a $3,000,000.00 First Pyramid Flex 79 policy to Steve Stoltz five (5) days after he received the $2,000,000.00 life insurance proceeds. (R.4413-14) It appears as though I also sold Guy Boyett and Bruce Sossaman $300,000.00 First Pyramid Flex 79 policies each a short time after Steve Stoltz was paid these insurance proceeds. (R.4414-15)

Bruce Sossaman: I have worked at Polyvend for 21 years. (R.4431) *The Friday Law Firm represented Polyvend when the insurance policy was taken out and paid, and continued to represent Polyvend and Steve Stoltz after Pat Stoltz' death.* (R.4453)

Guy Boyett: I worked for Pat Stoltz at Polyvend when these life insurance policies were purchased. (R.4456) I never told any members of the Estate, or any other brothers and sisters, about their potential claim to the insurance proceeds. (R.4470)

Allan "Dick" Horne: I am associated with FPL as an attorney and witness. I am not a disinterested party. (R.4523-24) The Policy

Provisions should control the beneficiary. An insurance company has a contractual obligation to pay the designated beneficiary. (R.4524-25) *The insurance company recognized that the Estate had a potential claim.* (R.4528) *I told FPL there was a substantial risk whether the proceeds were paid to the son or the Estate. If the money was interplead, I alerted FPL to the fact that it could be exposed to a suit by the loser.* (R.4540-41) *I would have told Steve Stoltz the substance of the memos, and the discrepancy concerning the proper beneficiary, had I thought he was not informed of same. I would have told him about the whole matter, and the whole picture, had I thought he was not informed.* (R.4543-44) I have no knowledge the Estate knew about, or was informed of, its potential claim. I brought the Estate's potential claim to FPL's attention and told them that an interpleader was the safest alternative. This action would have alerted the Estate to its potential claim. I had FPL require an indemnity agreement when they paid Steve Stoltz in case they paid the wrong person. (R.4544-45). *I advised FPL of the adverse interests of the son and the Estate, and the fact that the Trustee of the Residuary Trust may seek further inquiry if there was a chance the policy funds may pass to such trust, especially if no other assets passed to such trust.* I heard Robert Grant of First National Bank testify that First National Bank was never informed of the Estate's potential claim, and have no knowledge the Trustee of said trust was advised of the Estate's potential claim. (R.4548-49).

Mike Stoltz: I first became aware of the October 5, 1977 financial statement, and that the Estate had a claim, on August 8, 1988. I was in shock. We felt we have been lied to. I thought the money had been left to Steve to pay estate debts. (R.4593-96) The Estate has remained open since 1978 and has not closed as of today. (R.4603) *We had to have a Court Order to get the documents on August 8, 1988 showing the Estate was the beneficiary of the life insurance policies.* (R.4613).

Lewis Mathis: NOTE: *Plaintiff wanted to go into the Tolling Agreement executed by the Friday Firm, tolling the statute of limitations as to the Friday Firm until the suit against First Pyramid Life was concluded. The Trial Court disallowed same.* (R.4611-12, 3531-35, 4676-80).

I was a lawyer with the Friday Law Firm from 1972 until 1990. I began working for J.P. Stoltz and Polyvend in 1972 and continued through 1980-81. (R.4627-28) *I have never seen the insurance company files, or the memos from Allan Horne and John Peace.* (R.4645) *As the attorney for the Estate, I only had a fiduciary relationship with the Executor, not the other beneficiaries.* (R.4649) If Steve Stoltz had not paid estate debts, including the large debt owed to First National Bank which had Polyvend stock pledged as collateral, he would have been forced to sell Polyvend, instead of keeping it all to himself, and share the proceeds received from said sale with his brothers and sisters. (R.4653-54) *There is a tax write up document from the IRS files, written by the IRS investigator, that says "... although the proceeds were paid to Steve Stoltz, there was and still is a question as to whether he was in fact the proper beneficiary."* (R.4656-57) (See also Plaintiff's Exh. 35) *The Friday Firm whited out portions of the Estate files before turning them over to the IRS.* (R.4658) The other children and beneficiaries had no individual counsel. (R.4666)

James Saxton: I am an attorney with the Friday Law Firm and have done work for the Estate of J.P. Stoltz. (R.4681-2) *None of the other beneficiaries were ever contacted by me.* I had no doubt James Stephen Stoltz was the beneficiary. (R.4692) *During the Estate tax litigation, files were altered (whited out) and then sent to IRS.* (R.4706) The IRS prepared a RAR which indicated the estate may be the proper beneficiary. (R.4706-07) Mr. Horne was concerned about FPL's potential liability to the estate. (R.4709) *The fear of being sued can motivate people to do certain things.* (R.4710) The IRS was attempting to receive information from

FPL. I knew the IRS did not have the Ron Mason memo of 8-9-76 indicating that any transfer of ownership without the Flex 79 Trustee's signature was ineffective, and conveyed this to Steve Stoltz. *I was representing the Estate and Steve Stoltz personally.* I was trying to convince the IRS Steve Stoltz was the beneficiary. I do not know if the Estate wanted me representing their interests under these circumstances. (R.4712-14). *The Friday Firm has been placed on notice that a potential claim for legal malpractice exists against it for mismanaging the Estate and not properly informing the Estate that it had a claim to these proceeds.* (R.4724-25) *I refused to talk to Mike Stoltz.* (R.4726).

Steve Stoltz: I had to assume a $1.62 million debt to First National Bank when my father died. Polyvend stock was pledged as collateral for this debt and Polyvend was left to me to run in my Father's Will. (See Defendant's Exh. 149, the Last Will and Testament of J.P. Stoltz) (R.4756) *I was never told by FPL about the memos from Allan Horne or John Peace indicating there was an issue concerning the proper beneficiary when they had me sign an indemnity agreement. If I had known there was an issue, I would have acted differently.* (R.4773-74) I understood if I had to sell Polyvend, the proceeds would be split between me and my brothers and sisters. (R.4779) My Dad never intended for the Estate to turn out the way it did, and for my brothers and sisters and other relatives not get anything through the Residuary Estate. (R.4795-97) *I never told the Estate about the June 7, 1983 letter from James Saxton telling me of the Estate's potential claim because James Saxton called and said forget it.* (R.4799) *Everything I did was upon the advice of the Friday Law Firm.* (R.4800-01) *Within six days of receiving the $2 million I purchased $3 million of life insurance from FPL.* (R.4804-05) See Plaintiff's Exh. 30.

Rita Fields: I did not know until 1988 that Steve, and not the Estate, had been paid the life insurance proceeds.

John Smith: I found out on August 8, 1988 that the money had been paid to Steve and not the Estate (R.4859)

EXCERPTS FROM EXHIBITS — STOLTZ

Allan Horne's Memorandum dated 1-18-78, found in Plaintiff's Exh. 1, at GL I-231. Four variations are discussed wherein the son (Steve) would be the beneficiary, with this quote discussing same:

> It should be noted that none seem fully satisfactory from a contract law standpoint since certain terms of the contract must be ignored, proper signatures were not obtained, or required by the company, certain changes must be allowed "ab initio" which is of questionable validity, especially in the absence of a clear intent, etc.

Several variations wherein the Estate is the beneficiary were discussed and noted. The Memo next contains this quote:

> *The Estate and the son do have adverse interests in this case.* Though the son is Executor of Mr. Stoltz' Will, the Will leaves the residue of the Estate to First National Bank in Little Rock as Trustee of a Trust for about 15 different parties. If anyone had the understanding these policy funds would pass to such Trust, particularly if no other significant assets passed to the Trust, *further inquiry may be forthcoming from the Trustee* or beneficiaries of the Trust.
>
> *The advantage of interpleader* or reformation actions is that contract actions by other parties

should be cut off. However, *this may have no affect on negligence actions and would alert all parties to the problem . . .*

If payment was made to the son, an Indemnity Agreement from him could reduce exposure. The Indemnity Agreement would be broadly drawn. *Exposure to a negligent suit by the Estate if the intent of the insured was found to be to leave the proceeds of the policy to the Estate and Trust established in the Will would still exist.*

Summary: *There is substantial risk whether payment is made to the son or the Estate . . .*

An interpleader action is probably the safest course. However, the company could be exposed to a suit from the loser, i.e. the son or the Estate. Therefore, this alternative is not a complete solution either.

Memorandum from John B. Peace to Allan W. Horne, found in Plaintiff's Exh. 1 at GLI-235.

Page 1:

Some evidence points to the fact that the insured's Estate is the beneficiary *(the policy itself appears to name the Estate), . . .*

Page 3:

It appears to me that an interpleader action might be an *invitation to the heirs of the Estate*

to come in and fight for determination that the Estate is the beneficiary.

Page 4:

I believe that either a suit for reformation or an interpleader action would be an appropriate step for First Pyramid to take under the above circumstances.

If First Pyramid makes payment to the son, and a Court later found that the decedent intended the Estate to be the beneficiary, I believe the Estate could show that *it had been damaged by the face amount of the policy which it did not receive.*

Indemnity Agreement signed by Steve Stoltz, found in Plaintiff's Exh. 1 at GL1-239.

The beneficiary (Steve Stoltz) does hereby represent and warrant to Pyramid that no other person, organization or entity has any right, claim or interest in the policies or against Pyramid or against any of its officers, directions or employees concerning its action, representations, or processing of the policies, or payment of the proceeds of the policies to the beneficiary. The beneficiary does hereby agree to indemnify Pyramid and hold it harmless from any loss of any kind or nature suffered by Pyramid as a result, consequence or occasion where the actions, representations or processing of the policies, or the payment of the proceeds of the policies to the beneficiary.

The insured's company's file contains a memorandum found in Plaintiff's Exh. 1 and GL1-84 documenting a meeting that occurred on November 5, 1979 between various individuals at First Pyramid Life and Trip Lazalere of the Friday, Eldridge & Clark law firm, which represented First Pyramid Life from 1978 up to and through the time it was sold, discussing the various tax ramifications involved in this matter. See also the Affidavit of Glen Cary, an employee of First Pyramid Life from June of 1979 until January of 1984, indicating that William H. Sutton of the Friday Law Firm was elected to the Board of First Pyramid in June of 1979, and that the Friday Law Firm had been providing legal advice to First Pyramid prior to June of 1979, and through the years provided extensive legal advice to First Pyramid. (R. 744) The Friday Firm does not deny, and candidly admitted to the Trial Court, that it represented First Pyramid Life itself, along with every other interested party, during the time when the statute of limitations would have run, i.e. 5 years, and there been no fraudulent concealment, and in particular in June of 1983 when Jim Saxton of the Friday Firm reviewed the insured's company's file and wrote Steve Stoltz a letter indicating the Estate may have a potential claim. (R. 3335-3367)

Defendant's Exh. 20: *1-18-78* Memo by John Shields of First Pyramid Life allegedly documenting meeting between Allan Horne, Jack Hewitt, Jim Duran and John Shields, *which is same day of Memos from Allan Horne and John Peace* noting discrepancies as to the proper beneficiary.

> Our contention is the son is the beneficiary and should receive the proceeds. *He is the only one to make a claim for the proceeds.*
>
> Allan Horne outlined 3 alternatives . . . 3) File an interpleader (this could instigate a negligence suit).

Defendant's Exh. 129: Instruction sheet for policy change for policy no. 141979F:

> Type new policy — show ownership as Flex 79 Trustee. Transfer of ownership dated 3/1/76 shall be removed from policy. Dated August of 1976.

Plaintiff's Exh. 35: RAR from IRS Agent Chapman to James Saxton of the Friday Law Firm:

> During the examination of the claim, the Estate was again requested to provide data on the policy. The request was for access to the *company* records regarding the application issue (including reinsurance) and possible transfer of ownership of the policy, plus any endorsements, changes of beneficiary applications, etc. The information was provided, but in at least two places the file had been altered to prevent the review of information by the Internal Revenue Service. You (through your attorney) refused to disclose the data found in those places. . . .
>
> It should be noted that the Estate did not establish that the decedent's Estate was not the beneficiary, (although the proceeds were paid to J. Stephen Stoltz, there was and is a question as to whether he was in fact the proper beneficiary.

Plaintiff's Exh. 3 — Memo of 8-9-76 from Ron Mason of First Pyramid Life to Paul Dixon, the agent who sold the policy:

> A recent reassessment of the administrative procedures under our Flex 79 Program has led us to request that any policies which bear an assignment or change of ownership be returned to us. We consider that such assignments or change of ownerships are ineffective without the Trustee's countersignature.
>
> If Mr. Stolz (sic) requires that the ownership of his policy be changed, please have him return the policy together with a new "Change of Ownership" form signed. Otherwise, please have him return the policy so that the previous change of ownership can be removed.

Defendant's Exh. 145: Letter from James Saxton to Steve Stoltz:

> Mr. Chapman's (IRS examiner) documents did not include the memorandum from Ron Mason to Paul Dixon of August 9, 1976, which indicated that it was First Pyramid's belief that the assignment as originally executed was not effective . . .
>
> At this point it appears that our first hurdle will be to prove to the Internal Revenue Service that in fact the policy was duly and validly assigned by your father to you. In the event that we convince Mr. Chapman, we'll then have to convince him that the assignment was made "in contemplation of death".

JURY INSTRUCTION CO-AUTHORED BY PARTIES' RESPECTIVE COUNSEL AND GIVEN WITHOUT OBJECTION (ATTACHED AS EXHIBIT B TO BRIEF IN SUPPORT OF *MOTION FOR VACATUR*, AND FILED WITH ARKANSAS SUPREME COURT)

JURY INSTRUCTION NO. 8

The plaintiff on behalf of the estate of James Patrick Stoltz, deceased, specifically alleges as a defense to USAble and First Pyramid's defense of limitations that the defendant fraudulently concealed information from the estate which would have allowed him to bring this cause of action at an earlier date. With respect to plaintiffs' allegation, you are instructed that mere ignorance of one's rights does not prevent the operation of the statute of limitations, but where the ignorance is produced by affirmative and fraudulent acts of concealment, the statute of limitations does not begin to run until the fraud is discovered. If there is some positive act of fraud which would conceal a person's cause of action, then the statute is tolled. You are further instructed that silence on the part of one who has a duty to speak constitutes fraudulent concealment and actionable fraud and will toll the statute of limitations. In this case whether or not there was a duty to speak depends on whether or not the estate was the legal beneficiary.